No. 15-10778-C

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

DAVID BENOIT MECH,
d/b/a THE HAPPY/FUN MATH TUTOR,

Plaintiff/Appellant,

vs.

SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATED DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
DC Case Number: 13-cv-80437

SUPPLEMENTAL BRIEF OF APPELLEE

Shawntoyia Bernard, Esq.
JulieAnn Rico, Esq.
Office of General Counsel
School Board of Palm Beach County
Post Office Box 19239
West Palm Beach, FL 33416-9239
Telephone: (561) 649-6811
Facsimile: (561) 434-8105
Shawntoyia.bernard@palmbeachschools.org
Attorney for Appellee

CERTIFICATE OF INTERESTED PERSONS

The Appellee certifies that the following persons have an interest in the outcome of this appeal:

1. Bernard, Shawntoyia
2. Dillard, Kalinthia R.
3. Garrison, Kris
4. Green, James K.
5. Jacque-Adams, Kathelyn
6. Latson, William
7. Littlejohn, Blair
8. Marra, Kenneth
9. Matthewman, William
10. Mech, David Benoit
11. Riopelle, Gerald
12. Rico, JulieAnn
13. The School Board of Palm Beach County, Florida
14. Slack, Peter
15. Walters, Lawrence

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ARGUMENT

The Recent Decision of the Supreme Court in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, While Distinguishable from the Instant Case, Provides Support as to the Reasonableness of the School Board's Decision to Remove Appellant's Banners From Its School Fences.[1]

As an initial matter, summary judgment was proper given that: 1) Appellant had no right to have his banners on the school fences because he did not have valid and enforceable contracts with the School Board at the time that the banners were removed; 2) School Board Policy 7.151, upon which Appellant relies, states on its face that the School Board did not intend to establish an advertising program or 3) the banners at issue were not removed due to the message, ideas, content or viewpoint of Appellant's speech on the banners. Notwithstanding, the *Walker* case, *albeit* distinguishable, most certainly provides support as to the reasonableness of the School Board's decision to remove Appellant's banners. *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239 (2015).

From the onset, the School Board wants to make clear that it does not view speech or Appellant's viewpoint as being at issue in the instant case. All of the banners on school fences, including Appellant's, are required to have the same

[1] This Brief is being submitted in compliance with the Court's August 28, 2015 letter to the parties requesting supplemental briefing to address the impact of the recent Supreme Court decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc*., 135 S.Ct. 2239 (2015).

content (i.e. the name of the business partner, phone number, a web address, and the phrase "Partner in Excellence") and, thus, the School Board has never asserted any objection to the language affixed to any of Appellant's banners. There has never been any speech or viewpoint with respect to Appellant's banners that the School Board has intended to silence because the banners have never contained any controversial language or viewpoint. That aside, to the extent a constitutional speech analysis is necessary, the *Walker* case, while distinguishable in many ways, does share some similarities to the facts in the instant case and perhaps may offer some guidance to the Court.

In *Walker*, the Texas Department of Motor Vehicles Board denied the confederate flag adorned license plate because public comments revealed several members of the public found the design to be offensive and because a significant portion of the public associate the confederate flag with hate organizations. *Id*. at 2245. The Motor Vehicles Board also had concerns about possible "public safety" issues or that the "design could distract or disturb some drivers to the point of being unreasonably dangerous." *Id*. at 2258. Because the Motor Vehicle Board selects each design and presents each design on "government-mandated, government-controlled, and government-issued IDs" and places those designs below large letters that read, "TEXAS", the Court determined that such designs that were accepted were meant to convey a "government message." *Id*. 2250. The Court was of the view

that Texas specialty license plates operated as extensions of the government and its speech and that neither a private party nor the government could force the other to convey its ideological message. *Id*.

The facts in the instant case are somewhat different from the facts in *Walker*, in that, school banners have been previously held to be nonpublic forums open for a *limited purpose*. (emphasis added) *See DiLoreto v. Downey Unified Sch. Dist. Bd. Of Educ.*, 196 F.3d 958 (1999). Moreover, the Court in *Walker* went to great lengths to distinguish the facts from cases involving nonpublic forums making the instant case quite different from *Walker* in that regard. *Walker*, 135 S.Ct. at 2252 (citing *Perry Ed. Assn v Perry Local Educators' Assn.*, 460 U.S. 37 (1983); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788 (1985)). One point, however, the *Walker* case does highlight, and the School Board believes does apply to the instant case, is the notion that governments (or county school districts) need to be able to exercise some control over and/or freedom "to select the messages it wishes to convey" because the public (in this case, parents and community partners) is going to interpret school banners, or monuments or license plates as conveying the message of the owner (in this case, property owner School Board). *Id*. at 2247 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 471 (2009)). Indeed, just as the Court opined in *Walker* that "a person who displays a message on a Texas license plate likely intends to convey to the

public that the State has endorsed that message," likewise, an individual or corporation who gets to hang their banner on a school fence, too, hopes the public will interpret that the school or School Board has endorsed them. Even more, the fact that all school banners in the instant case include the language, "Partner in Excellence," furthers the likelihood that the viewing public and community partners get that impression. Thus, while school banners have not been determined by reviewing courts to be government speech, the effect of placing a banner on the school fences has essentially the same effect and impact on the public's interpretation as the specialty license plates in *Walker*.

Simply, as in *Walker, Summum,* and other cases where government has not been deemed to have created a public forum, it is critical that the School Board's schools have the ability to retain its authority to refuse to reasonably "lend the schools' name and resources to speech disseminated under school auspices." See *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988); *Planned Parenthood v. Clark County School District,* 941 F.2d 817 (9th Cir.1991). The School Board firmly believes that its decision to remove Appellant's banners was reasonable and not an effort at viewpoint discrimination or "censorship," as argued by Appellant. It is indeed concerned about many of the same dangers set forth in *Walker* – allowing Appellant's banners to hang might carry a school-sponsored, school-endorsed message to parents and community partners

and put the School Board on one side of a controversial issue. *See Planned Parenthood*, 941 F.2d at 830.

CONCLUSION

In Summary, while *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, is distinguishable from the instant case in the various ways described above, as also noted above, the School Board believes it does provide support as to the reasonableness of the School Board's decision to remove appellant's banners from its school fences.

CERTIFICATION OF COMPLIANCE

This Brief complies with the Court's August 28, 2015 letter to the parties limiting the parties' briefs to 10 pages each.

Additionally, this Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2013 in 14-point New Times Roman font.

/s/ Shawntoyia N. Bernard
By: Shawntoyia N. Bernard, Esq.
Florida Bar No.: 0651664

CERTIFICATE OF SERVICE

I, Shawntoyia N. Bernard, hereby certify that on September 17, 2015, a copy of Appellee's Supplemental Brief was electronically filed with the Court using CM/ECF. I further certify that on September 17, 2015, copies of this Brief was sent via Federal Express for the overnight delivery to the Clerk of Court, and to the following counsels:

JAMES K. GREEN, P.A.
James K. Green, Esq.
Suite 1650, Esperante
222 Lakeview Avenue
West Palm Beach, FL 33401
Telephone: (561) 659-2029
Facsimile (561) 655-1357
jameskgreen@bellsouth.net

WALTERS LAW GROUP
Lawrence G. Walters, Esq.
195 W. Pine Avenue
Longwood, FL 32750
Telephone: (407) 975-9150
Facsimile: (407) 774-6151
Larry@FirstAmendment.com

School Board of Palm Beach County
Office of General Counsel
JulieAnn Rico, Esq.
Post Office Box 19239
West Palm Beach, FL 33416-9239
Telephone: (561) 649-6811
Shawntoyia.bernard@palmbeachschools.org

/s/ Shawntoyia N. Bernard
By: Shawntoyia N. Bernard, Esq.
Florida Bar No.: 0651664
JulieAnn Rico, Esq.
Post Office Box 19239
West Palm Beach, FL 33416-9239
Telephone: (561) 649-6811
Shawntoyia.bernard@palmbeachschools.org